The Legal Issues of Serving New Development

Thomas P. Snyder

Special assessments, exactions, and development fees are quickly becoming popular among cities with development pressure. This article discusses the limitations the courts place on the use of such financing for infrastructure, thus giving guidance to local officials. Many of the limitations on private financing involve drawing fine legal distinctions in wide "gray" areas, or making decisions when the courts future direction is uncertain. If local officials are to make informed decisions in such situations, they must understand some of the legal reasoning that underlies private financing.

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Court decisions and other legal limitations have had a pivotal influence on the use of private financing for new infrastructure in the United States. Through the first half of this century, statutory and case law severely limited the types of infrastructure that could be financed privately. The courts generally viewed restrictions on private financing as necessary to protect individual rights. The provision of most infrastructure was seen as a responsibility of society; the responsibility of the individual for financing such infrastructure was through general taxes, which were established to finance the general activities of government. Private financing of any infrastructure that did not provide direct, localized benefits to those who had to pay for it was seen by the courts as circumventing the basic system of public finance. It was also seen as an effort by local governments to shift financial responsibility for government activities to specific individuals or groups in a way that was not justified under such basic principles of taxation as "ability-to-pay." For such reasons the courts regularly prohibited the use of special assessments and exactions to provide parks, schools, libraries, arterial roads, and central wastewater treatment and water supply facilities.

In recent years the courts have liberalized their approach to private financing of new infrastructure. Previous restrictions on the use of private financing had failed to recognize the effect of growth on tax rates and user charges when infrastructure was publicly financed and had not foreseen the political results of forcing current residents to bear much of the cost of new development in rapidly growing areas. To address those realities, the courts have allowed the use of private financing to fund a broader range of infrastructure. In liberalizing the use of private financing, the courts have shifted emphasis from the general principles of public finance that underlie the tax system to protecting public interests from the effects of private development decisions.

In making that shift the courts are initiating vital reforms in the use of private financing. There are, however, critical questions as to whether the courts have gone too far and whether they are ignoring important areas of intergenerational responsibility (cost-sharing between current and future residents) that have been established over the years.

First the legal issues associated with the use of special assessments will be discussed, followed by the legal issues involved in using exactions and development fees. Legal reasoning about special assessments is fairly well established and has changed little in recent years. Consequently, special assessments are limited in most instances to their traditional role of financing specific projects which provide local benefit, and in most states have been only marginally beneficial in dealing with the costs rapid development places on current residents. For that reason, the discussion of special assessments focuses on the types of facilities that can be financed with them and on possible ways to expand that narrow universe. In contrast, the legal limitations on what can be financed with exactions and development fees have changed dramatically in recent years.

These changes have made exactions and development fees an effective tool in dealing with the fiscal impacts of new development in rapidly growing areas, but they also raise questions about their appropriateness in slow growing areas.

Criteria for the Use of Special Assessments

The legal foundations for special assessments were firmly established at the beginning of this century and have changed little since then. In fact, the language contained in many of the early twentieth-century court cases was so strong that it has been virtually impossible to use special assessments to solve some of the problems communities now face in financing new infrastructure.

Writing in 1898, when the U.S. Superme Court handed down a landmark decision that established modern principles of special assessments, Victor Rosewater described three legal phases in the evolution of special assessments.[1]

In the first phase, special assessments were viewed as exercise of police power. They were introduced as a way of eliminating public nuisances, and they could be used only after the property owner was given the opportunity to eliminate the nuisance on his own. The second phase in the evolution of special assessments, also an exercise in police power, involved the use of local governments' condemnation powers or powers of eminent domain to acquire the rights of way for new streets and roads. Special assessments were used to recover the public costs of land acquired under eminent domain power from those who benefitted. This second phase in the use of special assessment left the communities without a way of financing improvements to the newly acquired public rights-of-way. The need for local revenues to improve and pave new streets ushered in the third phase in which special assessments are justified as a use of *taxing* rather than police power. It is this third phase that characterizes the use of special assessments today.

Restrictions on the Use of Special Assessments

As an exercise of taxing powers, special assessments must be specifically authorized by the state either through enabling legislation or constitutional provision. Without such authorization, they, like most other taxes, are routinely rejected by the courts as an illegal exercise of revenue collecting powers. Even in states such as California, where the courts have accorded broad revenue powers to localities under home rule, special assessments require specific authorization, because the courts have determined that the state has preempted local governments in regulating the use of such financing. Some of the difficulties that local governments are likely to encounter with existing enabling legislation include the following: grants of special assessment powers to particular levels of governments, (such as cities, counties or specific types of independent special districts); limits on the use of assessments to particular types of infrastructure, (such as roads, sewer extensions, and sidewalks); prescriptions on specific ways of allocating costs ot different types of property, (such as front footage or acreage charges); and restrictions on the government's ability to borrow against the revenues. In

authorization powers

most states, legislatures have been willing to change special assessment laws regularly to meet communities' needs.

Uniformity

Although special assessments are viewed as an exercise of taxing power, they are distinguished from general taxes, which must be imposed at uniform rates. In most states, either constitutions or statutes require that local governments impose taxes uniformly throughout the jurisdiction. In states which allow property to be "classified" for property purposes, taxes must be uniform on all similarly classified property in the jurisdiction.[2] Uniformity requirements are an effort to guarantee that all people who are in essentially similar situations are taxed at the same rate throughout a jurisdiction. Furthermore, "reasonableness" required under the due process clauses of the federal and state constitutions is often measured by the degree of uniformity exercised by a municipality in imposing taxes. Special assessments clearly do not satisfy such uniformity requirements, since they are imposed in special assessment districts that do not encompass entire jurisdictions. To overcome such difficulties the courts established the concept of "special benefits" to distinguish infrastructure that could be legally financed with special assessments from infrastructure that had to be financed through uniformly imposed taxes. Special benefits were defined as benefits from public improvements that increase property values. In affirming the reasonableness of special benefits, the U.S. Supreme Court in 1898 in *Norwood v. Baker* ruled that:

tax distinctions

defining special benefits

> . . . the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefitted and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. . . .

Norwood and similar cases in the early part of this century established the basic criteria under which special assessments could be used.[3]

The definition of "special benefits" has proved more useful as a theoretical concept for justifying special assessments than it has as a criterion for determining where special assessments can be used. The problem with the formal legal definition of "special benefits" is that all infrastructure, regardless of size or scale, tends to increase the value of property, as has been indicated by recent research in public finance.[4] In trying to operationalize the concept of special benefits, the courts in the past half-century have come up with two criteria for determining when infrastructure provides "special benefits" and when it provides "general benefits." The first is to provide benefits to some properties at levels in excess of those provided by the city to all properties. The second is to define infrastructure as providing "special benefits" when the benefits of a specific facility are primarily local. Many courts have used this second criterion to prohibit the use of special assessments to finance infrastructure that provides benefits that accrue to all of society (such as educational benefits), as well as to prohibit special assessment financing based on the scale of a project. This criterion has been used effectively to justify the private financing of localized improvements that involve dramatically different costs in different parts of a city, due to such factors as the density of the development and types of land use in an area. Mandelker *et. al.* summarize the use of special assessments by noting:

> All such assessments have one common element: they are for the construction of local improvements that are appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the municipality. The benefit to the land must be actual, physical and material, and not merely speculative or conjectural.[5]

Since the above criteria involve making relative judgments, courts in various states have interpreted specific situations differently. The potential user of special assessments should refer to the precedent set in his particular state and to the more detailed discussions of specific cases found in most legal texts and case books on local government law.[6]

Allocating costs through assessments

In allowing the use of special assessments to finance infrastructure that provides special benefits, the courts have required that properties be assessed for costs in proportion to the benefits they receive, and that the revenues from the assessment not exceed the cost of the infrastructure being financed. The courts have allowed a great deal of discretion in the allocation for costs among benefitted parties, requiring only that the assessment formula approximate the proportion of benefits received. The relationship does not have to be exact. The courts have consistently accepted general rules of thumb, such as front footage or acreage, for allocating costs and generally have left the determination of reasonableness up to legislative discretion.[7] When properties that do not directly abut an improvement or that receive only indirect benefits from an improvement are assessed a portion of the cost of the improvement, the assessments are often challenged in court on the grounds that the assessed properties receive no special benefit. But recent decisions have upheld such assessments. Typical are the arguments of a California court:

> . . . Land may be included within an irrigation district, even though such land cannot legally receive any surface delivery of water from the district, since the land will be benefitted by the increase in ground water due to delivery of water on neighboring lands and will also increase in value because of the general increase in value of land within the region due to availability of water.[8]

Similarly, a South Carolina court upheld an assessment on property that was more than a mile from a sewer line, because the assessment was based on indirect benefits:

> . . . Indirect benefits which may accrue within the subdistrict include enhanced property value resulting from decreased distance to sewer disposal lines, proximity to well developed centers and generally improved conditions of sanitation and public health througout the area.[9]

In the South Carolina case the court also upheld the legality of subdistricts with differential assessment rates within the special assessment district. Furthermore, courts generally have not restricted assessments to one-time charges imposed at the time of construction, which is typical of most special assessments, but have upheld *ad valorem* assessments (based on either the value of all real property or the value of land), connection charges, and development fees.[10]

The primary trouble with limiting the use of special assessments (or exactions, development fees, or any other form of private finance) to infrastructure is that it limits a city's ability to shift some of the burden of financing area-wide facilities like arterial roads and sewage treatment facilities to developers. Because of such restrictions, exactions and development fees have been more effective tools for dealing with the impacts of rapid growth.

Exactions and Development Fees

Throughout their history, exactions have been viewed as an exercise of police powers. Development fees, on the other hand, can be viewed as an exercise of either police or taxing powers. The type of power underlying exactions and development fees determines the legal limitations and restrictions placed on them. In most states, cities have chosen to impose development fees under police powers because taxing powers require explicit authorization by enabling legislation. Generally, such legislation does not exist. The most notable exception to this is in California, where development fees are commonly imposed under taxing powers. In other states, development fees have been routinely overturned by the states where they were based on taxing power, either because of the lack of enabling legislation or because of the failure to comply with the constitutional provision of equal protection and due process.

legislation activity required

Exactions and Development Fees as Police Powers

The power to require exactions (dedication of land or facilities) is derived from the power to regulate land use authorized under zoning and subdivision enabling legislation. In all states, the courts have ruled that the police powers granted in zoning and subdivision enabling legislation are adequate to require dedications of infrastructure. In many states enabling legislation explicitly authorizes dedications of certain types of infrastructure in order to protect public health and safety. In other states enabling legislation grants only the power to limit and restrict the use of land in order to protect public health and safety, but the courts have ruled that required dedications of local streets and utility lines, for example, are authorized under such legislation.

classifying infrastructure

When imposing fees in lieu of dedication or development fees that are independent of dedication, most cities have also relied on the general grants of police power in land use enabling legislation. Such efforts have usually met with success, but not always. In several states, courts routinely have applied Dillon's rule, which requires explicit enabling legislation for powers granted to local governments. Alabama and Illinois are two such states, and in both states the courts overturned fees in lieu of dedications, citing inadequate enabling legislation. In Alabama the court invalidated an ordinance re-

fee imposition

quiring subdivision developers to either dedicate 0.18 acre per dwelling unit constructed or to pay a fee in lieu of dedication to fund public parks and playgrounds, noting only that the enabling legislation did not "specifically authorize the commission to require the payment of a fee in lieu of the dedication of the land as a condition of approval of a subdivision plat."[11] In Illinois the court struck down a condition that a subdivider pay $325 per lot for educational purposes, stating that:

> . . . regardless of advantages of flexibility in equalizing financial burdens that might be secured by substituting monetary charges for the dedication of land, . . . the plain fact is that the statute does not authorize this technique.[12]

In contrast, the courts in Colorado, Florida, New Jersey, Oregon, Utah, and many other states have upheld development fees that are completely independent of dedications and which have not been specifically authorized by the state.[13] Decisions in those states have upheld such fees as valid uses of police powers contained in zoning and subdivision enabling acts, even when not explicitly authorized.

The Reasonableness Standard

The requirement of reasonableness under due process has emerged as the primary standard for determining what types of infrastructure can be financed with exactions and development fees. Over the years three tests of reasonableness have emerged: (1) whether the need for the infrastructure is "specifically and uniquely attributable" to the new development, (2) whether there is a "reasonable relationship" between the public need and the conditions imposed on the developer, and (3) whether the exaction or fee would be used to the benefit of residents of the new development (the *rational nexus* criterion).

The "specifically and uniquely attributable" criterion is the most conservative and restrictive of the three. In 1961 in the now-famous *Pioneer Trust and Savings Bank v. Village of Mount Prospect* case, the Illinois court invalidated a requirement for dedication of land for educational purposes, on the grounds that the need for schools was created by the total development of the community and could not be specifically and uniquely attributed to the new development.[14] Until it was superceded in many states, this criterion was used extensively in prohibiting the use of exactions and development fees to (1) finance infrastructure that provided community-wide benefits, such as schools, parks, and recreational facilities, and (2) to finance roads and utilities that, because of their size, provided benefits to those outside a development. The criterion served essentially the same purpose that the special benefit criterion served for special assessments. It limited exactions and development fees to financing infrastructure that provided local benefits, and it made new residents pay, like all other residents, through taxes and utility charges for infrastructure that provided community-wide benefits. Because of the severe restrictions on what can be financed with exactions and development fees under the "specifically and uniquely attributable" criterion, however, new development still can impose an excessive burden on current residents in rapidly growing areas that do not use pure "pay-as-you-use" financing, as was the case for special assessments.

The Reasonable Relationship Criterion

From a regulatory or police power perspective, the reasonable relationship criterion is at the opposite end of the spectrum from the "specifically and uniquely attributable" criterion. It is the most permissive of the three. This criterion was established

in 1949 by the California Supreme Court in *Ayers v. City Council of Los Angeles.*[15] In *Ayers* the court upheld a requirement for dedication of a road abutting a subdivision that provided benefits to the community as a whole as well as to the development. The court required only that a reasonable relationship exist between the conditions imposed on the developer and the public needs generated by the new subdivision. The reasonable relationship criterion has been used only with regard to exactions, not development fees, and has been used principally to justify the exaction of roads and utility lines that either lie on or directly abut a development site.

The Rational Nexus Criterion: The Current Basis of Development Fees

The third criterion used in determining what can be financed with exactions and development fees is the rational nexus test, which conceptually lies between the other two criteria. The rational nexus criterion was first stated in *Jordan v. Village of Menomonee Falls* in 1966 and has become the basis for most development fees in use today.[16] In *Jordan* the court upheld a requirement for dedication, or fee in lieu of dedication, for school and parks, based on the costs of the portion of the facilities that was needed by the new development. In upholding the exaction and fee, the court directly aimed at the "specifically and uniquely attributable" criterion, which was the standard of the day, stating that it was virtually impossible for a municipality to prove that a new development was the sole beneficiary of public facilities. The court's alternative criterion was that only a "reasonable connection" had to exist between the costs borne by the new development and the needs it created. Under this rational nexus criterion the new development does not have to be the only one that benefits from a facility: what is important is that the revenues from the development fees be used to the benefit of those who pay them. The "rational nexus" criterion is more restrictive than the reasonable relationship criterion because new development is liable only for a portion of the costs of the facility needed by the development and not for the total cost of infrastructure from which it only partially benefits. The criterion is less restrictive than the "specially and uniquely attributable" criterion, however, because new development is responsible for a portion of the cost of *all* infrastructure that is needed to serve it and not just for the cost of the infrastructure that serves only that development. The fact that rational nexus can be used to justify developers financing of all types of infrastructure was explicitly reaffirmed by the Florida court in 1982 in *Home Builders and Contractors Association of Palm Beach v. The Board of County Commissioners of Palm Beach*, when it found that the validity of development fees depended "not on whether the money is spent on utility systems, roads or other public services," (i.e. on

equity problems

a specific type of infrastructure), but rather on whether it was spent for the benefit of the development paying the fee.[17]

While the rational nexus criterion has gained fairly wide-spread acceptance in recent years, there are still several important issues that are overlooked by the courts when they apply a strictly regulatory or police power perspective to infrastructure finance. In some areas the courts are starting to realize that there is a public finance side as well as regulatory perspective to these issues, and they are starting to raise questions that go beyond the narrow approach of the rational nexus criterion.

possible solution

Problems with Rational Nexus

There are two main problems inherent in application of the rational nexus criterion.

The first difficulty with rational nexus is a double payment problem. This problem occurs when exactions and development fees are used to finance infrastructure that traditionally has been publicly financed with taxes, utility fees, and the like. In such a situation new development pays the full cost of its own infrastructure through exactions and development fees, yet it still pays taxes and utility fees that finance the infrastructure which serves current residents. In essence, residents of new development pay taxes and utility fees as current residents do, yet they receive no infrastructure in return since theirs was paid for through exactions and development fees. This problem was recognized by the Utah Supreme Court in 1982 in *Lafferty v. Payson City.* The court said a development fee based on the rational nexus criterion was not equitable

multiple issues involved

> . . . since it fixes the entire cost of new facilities on newly developed properties without assurance that these costs are equitable in relation to benefits conferred and in comparison with costs imposed on other property owners in the municipality. For example, if the costs of maintenance and repayment of bonded indebtedness for construction of the existing system are being financed by general tax revenues, service fees, and other payments collected from the entire municipality — including the newly constructed homes — the new homes will be burdened with all of the capital costs of expanding the service capacity plus a portion of the costs of the existing one. In an effort to avoid this kind of unfairness . . . requires a different approach that imposing all costs of expansion of capacity on newly developed properties.[18]

The solution to part of the double payment problem is to deduct from development fees the present value of taxes and other payments made by the new development toward outstanding debt on existing infrastructure. If replacement of infrastructure is publicly financed, the development fee also needs to be reduced by the present value of taxes and other payments that will finance replacement of the already depreciated portion of existing infrastructure. In Florida many cities and counties are already making the first of these two adjustments. Palm Beach County's park fee, upheld in *Builders and Contractors of Palm Beach County* in 1982 — the year of the *Lafferty* decision — contained just such an adjustment.

The Dominance of Intergenerational Equity

The other major problem in applying the rational nexus criterion is more fundamental. The criterion fails to recognize that multiple issues are involved in financing different kinds of new infrastructure. In particular, the rational nexus criterion assumes that (1) there is intergenerational inequity — current residents paying for infrastructure that serves residents of new development — whenever infrastructure that provides benefits to new development is publicly financed; (2) that such intergenerational inequity is eliminated when infrastructure is privately financed with development fees; and (3) the improved intergenerational equity achieved through use of development fees is more important than the benefits of having infrastructure publicly financed redistributed among all members of society, including new residents of a city, by ability-to-pay rather than by benefits received.

These assumptions hold intergenerational equity as paramount in importance over all other issues, such as distributional equity among income classes. Decisions about how to finance infrastructure, however, should involve careful weighing of *all* issues and should be made independently for each type of infrastructure. Instead, under the rational nexus criterion, intergenerational equity is given priority over all other issues in the financing of new infrastructure development.

Traditionally, much of the infrastructure that has been publicly financed has been built and paid for by one generation on behalf of the next generation. Whenever financing of infrastructure is not on a true

Preparing the land

pay-as-you-use basis, part of the cost of infrastructure that serves new development is paid by current residents. In turn, the new residents are expected to pick up some of the cost of future development when it occurs. Under the rational nexus criterion, having current residents pay any costs of infrastructure that benefits new development is considered inequitable. That is in sharp contrast with well-established traditions of intergenerational sharing that has been an accepted part of public finance for years. Most people consider the sharing of costs between generations inequitable only when the burden of new development on current residents is excessive. Under the rational nexus criterion, however, any burden is deemed excessive. When this criterion is applied as the standard of intergenerational equity, most recent development receives a windfall, in that much of the cost of the infrastructure built to serve it was paid by prior residents, but the residents of recent development have no responsibility to fund infrastructure for development. Consequently, it is not necessarily inequitable, as assumed under rational nexus, if existing residents pay for infrastructure for new residents when infrastructure is financed with such traditional methods as taxes. Neither would a shift of responsibility to the developer for all infrastructure serving his development imply improved equity.

Furthermore, when the courts apply the rational nexus criterion to determine if development fees are regulations or taxes, they place issues of intergenerational equity above all the public finance issues associated with taxing powers. The courts make no effort at balancing intergenerational equity issues with other public finance issues when deciding if development fees are regulations or taxes on the grounds of who benefits from financed infrastructure. Instead, they make a decision based solely on the grounds of the police powers contained in land use regulations, which allow cities to regulate new development if it is deemed detrimental to current residents. But when the impacts of new development are fiscal, there are issues of taxation and public finance that cannot be ignored.

To demonstrate the narrow approach of the courts in this regard, it is helpful to look at the financing of schools. The traditional source of school funding is the property tax. Under property tax financing, owners of commercial, industrial, and higher income residential properties help subsidize schools in low income neighborhoods. Such financing is often justified on the ability-to-pay principle, in which those with the greatest ability to pay, contribute the greatest amount to general government activities. When the courts allow development fee-financing of schools on the grounds of rational nexus, redistribution of school costs is a moot point, since school costs are distributed based on who benefits. While such financing may reduce the impacts of new development on tax rates, it also undermines the redistribution that is inherent when taxes are used to finance schools. The courts make no ef-

landmark case

fort at weighing these costs of development fee financing against improved intergenerational equity.

Broadening Rational Nexus

In 1981, the Utah Supreme Court in *Banberry Development Corporation v. South Jordan City* recognized some of the broader public finance questions that should be considered by the court when determining the reasonableness of development fees.[19] The court ruled that "to comply with standards of reasonableness, a municipal fee . . . must not require newly developed properties to bear more than their equitable share of the . . . costs in relation to benefits conferred." The court then suggested seven factors that should be considered when making such an evaluation:

fee restrictions

> 1) the cost of existing capital facilities; 2) the manner of financing existing capital facilities . . .; 3) the relative extent to which the newly developed properties and other properties in the municipality have already contributed to the cost of existing capital facilities . . .; 4) the relative extent to which newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; 5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developer or owner . . . to provide common facilities . . . that have been provided by the municipality and financed through general taxation or other means . . . in other parts of the municipality; 6) extraordinary costs, if any, in servicing the newly developed properties; 7) the time-price inherent in fair comparisons of amounts paid at different times.

planning basis

In laying out the above factors the court made no attempt to apply them, leaving that to the municipality. In *Lafferty* the court said,

> If properly applied, those seven factors should put the new homeowner on essentially the same basis as the average existing homeowner with respect to costs borne in the past and to be borne in the future, in comparison with benefits already received and yet to be received.

Limitations on Fees Under Rational Nexus

The rational nexus criterion is the current standard in most areas, and any city officials considering development fees should be aware of the conditions courts have placed on its use. Most of the restrictions have to do with how the fee is set and how the revenues are used. One of the best summaries on such conditions occurs in *Home Builders and Contractors Association of Palm Beach County*, where the 15th Circuit Court of Appeals of Florida summarized the conditions laid down by the Florida Supreme Court in 1976 in *Contractors and Builders Association v. City of Dunedin*. In this landmark case, the Florida Supreme Court upheld development fees under the rational nexus criterion. The conditions since have come to be known as the "Dunedin Test":

> 1. New development must require that the present system of public facilities be expanded. 2. The fees imposed must be no more than what the local government unit would incur in accommodating the new users of the system. 3. The fees must be expressly earmarked for the purposes for which they were imposed.[20]

Fees Cannot Benefit Current Residents: The first requirement prohibits the use of development fees to fund the portion of facilities that benefits current residents or residents of other communities or to fund deficiencies in the current system. In some states this requirement also may prohibit the use of development fees to pay for facilities that were built before the fee was established, and possibly those built before fees were collected, even if such facilities were specifically built with excess capacity to accommodate growth An example of such an application of this requirement is in *Mitchell and Best Co. v. Washington Suburban Sanitary Commission*, where the Circuit Court of Montgomery County, Maryland, overturned a "systems expansion offset charge." The charge went to retire indebtedness for an existing sewage treatment plant that served those paying the fee.[21]

Proportionality: The second requirement limits the fee to the financing of the proportionate share of cost of a facility that serves those who pay the fee.

Separate Accounting: The third requirement is the one that is most often used by the courts in invalidating fees. It requires that revenues from fees be maintained in separate accounts from other revenues and that they be spent specifically for the benefit of those who paid them. In 1983 in *City of Fayetteville v. IBI, Inc*, the Arkansas Supreme Court ruled further that development fees must be spent within a reasonable time or be refunded.[22]

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Planning Considerations: Other limits that the courts have placed on development fees include that they be based on reasonable planning documents and studies and that there be adequate provision for those who pay the fee to challenge the criteria upon which the fee is based. In *City of Fayetteville* the court ruled that the city's park fee was not based on a sufficiently definite plan for parks to justify the imposition and the amount of the fee. The court pointed to the need for "reasonably definite" plans for spending the fee and for refunding the fee if areas do not develop as expected. This points to the need for coordinating fees with comprehensive plans and capital facility plans in determining both the level and expenditure of the fee. Since development fees adopted under police powers are regulations rather than taxes, there must be sufficient room to take account of special situations. Julian Juergensmeyer, a noted land use attorney at the University of Florida, has stated this very effectively by noting that:

> In place of a rigid and inflexible formula for calculating the amount of the fee to be imposed on a particular development, a variance procedure should be included, so that the local government may consider studies and data submitted by the developer to decrease his assessment.[23]

In summary, the legal foundations for development fees are just evolving. There are many issues that the courts have to address, and it is likely that many of the current rules for determining the legality of fees will change as the courts begin to grapple with the more complex issues associated with them. The current rule used by most states in determining what can be financed with development fees is the rational nexus criterion. Under that criterion, cities can use fees to finance the pro-rata share of the costs of all infrastructure that benefits new development. This is a fairly liberal interpretation of police powers and allows cities to use development fees to address many of the fiscal problems associated with rapid growth. On the other hand, rational nexus allows cities to shift costs that should be considered a city-wide responsibility to the developers. Because of this evolving legal status, cities are advised to use a fair degree of discretion in deciding not only if they wish to use development fees, but for what type of facilities they may be used.

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NOTES

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